IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,	)	
	)	2 CA-CR 2006-0437
Appellee,	)	DEPARTMENT B
	)	
v.	)	MEMORANDUM DECISION
	)	Not for Publication
KEVIN SCHULTZ,	)	Rule 111, Rules of
	)	the Supreme Court
Appellant.	)	
	)	

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. CR200502134

Honorable Stephen F. McCarville, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
By Randall M. Howe and Michael T. O'Toole — Tucson
Attorneys for Appellee

Harriette P. Levitt — Tucson
Attorney for Appellant

E C K E R S T R O M, Presiding Judge.

¶1 Appellant Kevin Schultz was convicted after a jury trial of twenty-two counts of sexual conduct with a minor and one count of furnishing obscene materials to a minor. The jury found a number of aggravating circumstances existed on each count, and the court sentenced him to a combination of presumptive and aggravated, consecutive prison terms totaling 300.5 years. On appeal Schultz argues (1) the state did not have jurisdiction to adjudicate four of the counts that were alleged to have occurred at Apache Lake; (2) he was denied a fair trial because of the prosecutor's misconduct during Schultz's cross-examination; (3) he was denied the right to present relevant, exculpatory evidence about the reason for his genital piercings; and, (4) the court relied on aggravating factors that were either "already encompassed within the crimes charged," or otherwise impermissible, when it sentenced him.

¶2 We state the facts in the light most favorable to upholding the convictions. *State v. Tucker*, 215 Ariz. 298, n.1, 160 P.3d 177, 185 (2007). Schultz's daughter B. testified she and her father had an ongoing sexual relationship from about October 2004 to December 2005. She was fifteen years old when the sexual conduct began. B. testified in detail about numerous instances of oral, vaginal, and anal intercourse between her and her father, each charged as a separate count in the indictment.

¶3 B.'s friend R., who had stayed overnight at the Schultzes' trailer several times during the spring of 2005 and had accompanied them on a trip to Apache Lake in July 2005, testified that she had witnessed B. and her father having intercourse and performing oral sex

on each other. R. and B. also testified about an incident in which Schultz digitally penetrated R.'s vagina and an incident in which Schultz played a pornographic video while R. and B. were watching. R. was also fifteen years old at the time of the incidents.

¶4 R. informed school personnel about the incidents and B. corroborated the information the second time she was confronted by school personnel. After a telephone call to her father, in which B. asked questions at the behest of police detectives in an attempt to secure a confession from him, Schultz was arrested. A Pinal County grand jury indicted him on twenty-five counts of sexual conduct with a minor and one count of furnishing obscene materials to a minor. A jury found him guilty of twenty-two counts of sexual conduct with a minor and furnishing obscene materials. This appeal followed.

¶5 Schultz argues the state did not establish the trial court had jurisdiction over the offenses alleged to have occurred at Apache Lake. He contends Apache Lake is not in Pinal County, but rather partly in Maricopa County and partly in Gila County. Schultz relies on A.R.S. § 13-109 in support of this argument. It states, "Criminal prosecutions shall be tried in the county in which conduct constituting any element of the offense or a result of such conduct occurred, unless otherwise provided by law." § 13-109. However, when a defendant commits acts demonstrating his intent to commit a crime in one county but commits the crime itself in another county, trial may be properly held in the county where the preliminary acts occurred. *See State v. Comer*, 165 Ariz. 413, 423, 799 P.2d 333, 343 (1990); *State v. Poland*, 132 Ariz. 269, 275-76, 645 P.2d 784, 790-91 (1982). We note

Schultz is essentially arguing the venue was improper, although he frames it as a jurisdictional question. *See State v. Willoughby*, 181 Ariz. 530, 538 n.7, 892 P.2d 1319, 1327 (1995) (noting difference between venue, which can be waived, and subject matter jurisdiction, which cannot).

¶6 In any event, Schultz did not raise the issue before trial and cannot raise it for the first time on appeal. *See id.*; *State v. Girdler*, 138 Ariz. 482, 490, 675 P.2d 1301, 1309 (1983). And even were we to undertake a review for fundamental error, which Schultz has not asked us to do, he has not shown he suffered any prejudice by being tried for those counts in Pinal County, rather than in Maricopa or Gila counties. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607-08 (2005) (defendant's burden to show prejudice in fundamental error review).

¶7 Schultz next argues he was denied his right to a fair trial because of prosecutorial misconduct. We review for an abuse of discretion the trial court's ruling on an objection to alleged prosecutorial misconduct.[1] *State v. Roque*, 213 Ariz. 193, ¶¶ 154,

[1]The state contends Schultz has not preserved the issue for appeal, absent fundamental error, because he objected below only on foundational grounds. *See State v. Rutledge*, 205 Ariz. 7, ¶¶ 29-30, 66 P.3d 50, 56 (2003) (objection "shifting the burden" not sufficient to preserve claim of prosecutorial misconduct). As we conclude, *infra*, Schultz has not suffered prejudice by the prosecutor's improper display. We therefore need not decide whether Schultz adequately preserved the issue. *See Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d at 607-08 (defendant must have suffered prejudice to be entitled to relief if he failed to object below); *State v. Hughes*, 193 Ariz. 72, ¶ 32, 969 P.2d 1184, 1192 (1998) (prosecutorial misconduct harmless error if, beyond a reasonable doubt, it did not affect the verdict). We note, however, that Schultz objected strenuously and, in doing so, articulated why the prosecutor's behavior was not proper. Under such circumstances, we

157, 141 P.3d 368, 403-04 (2006). The conduct at issue occurred during the prosecutor's cross-examination of Schultz. While the prosecutor was questioning Schultz about B.'s testimony that he had, on one occasion, struck her ten times with a belt when she was younger, the prosecutor simultaneously struck his chair with two black straps, a piece of tangible evidence in the case, apparently to emphasize the violent nature of the alleged incident to the jury.

¶8 Schultz contends the prosecutor's actions were "inappropriate and highly prejudicial." We agree the actions were inappropriate. Although it was permissible for the prosecutor to aggressively cross-examine Schultz about B.'s testimony, *see State v. Thompson*, 110 Ariz. 165, 170-71, 516 P.2d 42, 47-48 (1973), absent foundational evidence it was improper to use the straps against the chair to demonstrate the beating. The prosecutor had introduced no evidence that the straps were ever used by Schultz to strike B. To the contrary, the black straps were in evidence because B. had testified Schultz used them for sexual bondage. And, the prosecutor laid no foundation that Schultz had struck B. with force equivalent to what the prosecutor used on the chair or that the noise arising from that conduct would be similar. *See State v. Hughes*, 193 Ariz. 72, ¶ 59, 969 P.2d 1184, 1197 (1998) (although prosecutor "can argue all reasonable inferences from the evidence," her "questioning and argument . . . cannot make insinuations that are not

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would be reluctant to conclude that Schultz has not properly raised a prosecutorial misconduct claim merely because counsel failed to utter the words "prosecutorial misconduct."

supported by the evidence"); *see also United States v. Kessler*, 530 F.2d 1246, 1257 (5th Cir. 1976) (government's introduction of assault rifle on the false basis that it exemplified weapons involved in crime was intentional misconduct). Thus, far from appropriately clarifying the facts of the case for the jury, the prosecutor's purported re-enactment of the alleged beating risked both misleading the jury and improperly appealing to the jury's passions. *See Comer*, 165 Ariz. at 426-27, 799 P.2d at 346-47 (although prosecutor has latitude to call jury's attention to vicious nature of offense, prosecutor may not make arguments that appeal to passions of jury).

¶9 Although we disapprove of the prosecutor's conduct here and believe the trial court should have restrained it,[2] his conduct was not pervasive enough for Schultz to be entitled to relief. It was only one isolated incident. *See Hughes*, 193 Ariz. 72, ¶ 26, 969 P.2d at 1191 ("To prevail on a claim of prosecutorial misconduct, a defendant must demonstrate that the prosecutor's misconduct 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'"), *quoting Donnelly v. DeChristoforo*, 416 U.S. 637, 643, 94 S. Ct. 1868, 1871 (1974).

¶10 Moreover, any prejudice that may have resulted from the prosecutor's improper theatrics would not have changed the outcome of the trial. *Hughes*, 193 Ariz. 72, ¶ 32, 969 P.2d at 1192 (prosecutorial misconduct harmless error if court can conclude

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[2]*See Berger v. United States*, 295 U.S. 78, 88, 55 S. Ct. 629, 633 (1935) (noting while a prosecutor should "prosecute with earnestness and vigor," he or she "may strike hard blows, [but] is not at liberty to strike foul ones").

beyond a reasonable doubt, it did not affect the verdict). Schultz argues he suffered prejudice because the jury found as an aggravating factor that it was necessary to protect the public from him. But the jury had ample other evidence from which to find that factor—evidence that Schultz had not only engaged in ongoing sexual conduct with his own daughter but had also lured his daughter's friend, with the use of intoxicating liquor, into sexual behavior. *See State v. McCuin*, 167 Ariz. 447, 450, 808 P.2d 332, 335 (App. 1991) (need to protect potential victims appropriate aggravating factor in sexual abuse case), *vacated in part on other grounds*, 171 Ariz. 171, 829 P.2d 1217 (1992). Given the detailed testimony of the two girls, the inculpatory nature of Schultz's comments during the telephone call with B., and the jury's independent opportunity to assess Schultz's credibility during his testimony, we conclude beyond a reasonable doubt that, absent the prosecutor's improper actions, the outcome of the trial would not have been different.

¶11 Schultz also argues the trial court erred when it precluded him from testifying about the reason he wears genital jewelry. We review for an abuse of discretion a trial court's decision whether evidence is relevant and admissible. *See State v. Wassenaar*, 215 Ariz. 565, ¶ 38, 161 P.3d 608, 618 (App. 2007). Schultz was allowed to testify that he has three piercings on his penis, and he usually wears "barbell studs" in those piercings while he is engaging in sexual intercourse. But the court precluded him from explaining his motivation for doing so, which is to enhance his sexual partner's pleasure. Schultz claims he was prejudiced by the court's preclusion of this testimony because "if B[.] were actually

telling the truth, then she should have been able to testify on direct examination concerning [Schultz]'s use of the body piercings during his sexual encounters."

¶12 We find no abuse of discretion in the trial court's preclusion of the evidence about the reason for the piercings. As noted, the trial court allowed Schultz to testify that he wore the studs during sexual intercourse. This was ample evidence from which the jury could draw any exculpatory inference that B. might be untruthful because she had not mentioned such jewelry during her detailed testimony about sexual conduct with Schultz. And, we can find no additional probative value or relevance in any testimony about Schultz's specific motivation for wearing that jewelry. *See* Ariz. R. Evid. 401; *State v. Herrera*, 176 Ariz. 21, 31, 859 P.2d 131, 141 (1993) (irrelevant testimony would not have amounted to legal defense); *State v. Oliver*, 158 Ariz. 22, 28, 760 P.2d 1071, 1077 (1988) (evidence with no probative value is inadmissible); *State v. Fisher*, 141 Ariz. 227, 245, 686 P.2d 750, 768 (1984) (irrelevant evidence properly excluded).

¶13 Finally, Schultz argues the trial court relied on improper aggravating factors in sentencing him. He contends the aggravating factors found by the jury were essential elements of the offense and, therefore, it was improper for the trial court to rely on these factors when it imposed aggravated terms. We review de novo "whether a particular aggravating factor used by the court is an element of the offense and whether the court properly can use such a factor in aggravation." *State v. Tschilar*, 200 Ariz. 427, ¶ 32, 27 P.3d 331, 339 (App. 2001). Generally, the legislature must specify that an element of an

offense may be used in aggravation by designating it one of the enumerated factors in the subsection of the sentencing statute relating to aggravating circumstances. If the legislature has not so designated, a trial court may not use an element of an offense in aggravation under the catch-all aggravating provision of the sentencing statute. *See State v. Germain*, 150 Ariz. 287, 289-90, 723 P.2d 105, 107-08 (App. 1986); *see also* A.R.S. § 13-702(C).

¶14 Here, the jury found four different aggravating factors present in varying degrees on the twenty-three counts: abuse of position of trust on all counts, multiple acts of abuse over a prolonged period on all but two counts, need to protect potential victims on fifteen counts, and multiple victims in a single incident on three counts. None of the factors found by the jury are enumerated specifically in § 13-702(C), but rather, fall under the catch-all provision, which allows the jury to find any factor that "is relevant to the defendant's character or background or to the nature or circumstances of the crime." § 13-702(C)(24). But we do not agree with Schultz that most of those factors were inherent in the underlying offenses.

¶15 Schultz was convicted of twenty-two counts of sexual conduct with a minor and one count of furnishing obscene materials to a minor. The elements of sexual conduct with a minor are "intentionally or knowingly engaging in sexual intercourse or oral sexual contact with any person who is under eighteen years of age." A.R.S. § 13-1405(A). And the elements of furnishing obscene materials to a minor are "recklessly furnish[ing] . . . any item that is [obscene]" if the person does so "with knowledge of the character of the item

involved." A.R.S. §§ 13-3506(A), 13-3501. Clearly, the factors of multiple acts of abuse over a prolonged period and the need to protect society are not essential elements of either offense, and can, therefore, be appropriately used in determining whether to aggravate Schultz's sentence. *See State v. Long*, 207 Ariz. 140, ¶¶ 38-39, 83 P.3d 618, 625 (App. 2004) (multiple acts of abuse over several years can properly be considered an aggravating factor in sexual abuse case); *McCuin*, 167 Ariz. at 450, 808 P.2d at 335 (need to protect potential victims appropriate aggravating factor in sexual abuse case). Notably, each act of abuse, other than the first charged, is arguably made worse by the repetitive, and increasingly routine, nature of it.

¶16 Schultz contends, however, that "abuse of position of trust" is an element of sexual conduct with a minor over fifteen years of age when the defendant is the victim's "parent, stepparent, adoptive parent, legal guardian or foster parent," because the legislature has designated such an offense a class two felony, whereas when the defendant does not have such a relationship to the victim the offense is a class six felony. § 13-1405(B); *see also State v. Alvarez*, 205 Ariz. 110, ¶ 17, 67 P.3d 706, 711 (App. 2003) (a trial court may not aggravate a sentence based on "a fact or circumstance that has already been reckoned into the statutory scheme elsewhere, either as an element of the offense or a basis for enhancing the range of sentence"). But even assuming that "abuse of position of trust" is an essential element of sexual conduct with a minor over fifteen when charged as a class two felony, the trial court could still use it as an aggravating factor if the degree was "greater than

what was necessary to establish an element of the crime." *Germain*, 150 Ariz. at 291, 723 P.2d at 109 (setting forth standard for using element of crime as aggravating factor under catch-all provision of sentencing statute).

¶17 Here, the record supports a finding that the degree to which Schultz abused his position of trust was beyond that necessary to establish the class two offense. *See Germain*, 150 Ariz. at 290-91, 723 P.2d at 108-09; *see also McCuin*, 167 Ariz. at 449, 808 P.2d at 334 (finding sexual abuse crimes by father against daughter "particularly heinous" because of violation of position of trust). Schultz, B.'s custodial and only living parent, provided her with alcohol and pornography while engaging in an ongoing sexual relationship with her when she was fifteen years old. She testified she participated and kept their conduct secret because she was afraid of her father, she wanted to make him happy, and she did not want to lose him. Thus, the record supports a finding that the features of Schultz's abuse of his position of trust were extreme and beyond that necessary to establish the offense. *See Germain*, 150 Ariz. at 290-91, 723 P.2d at 108-09 (presuming trial court found extreme recklessness on record before it). We find no error in its use as an aggravating factor.

¶18 Last, Schultz contends the trial court erred in aggravating some of his sentences based on the multiple victims factor, relying on *State v. Alvarez*, 205 Ariz. 110, 67 P.3d 706 (App. 2003). But *Alvarez* does not control the result here. "Alvarez did not have 'multiple victims' in the sense in which that term is normally used, denoting multiple

victims of a single act, episode, or scheme." *Id.* ¶ 13. Rather, that case involved six victims from six unrelated incidents that had been consolidated for trial. *Id.* ¶¶ 1, 4. Here, the jury found the aggravating factor "multiple victims in a single incident" on three counts. One of the counts named both R. and B. as victims, and the other two involved incidents where one girl had witnessed sexual conduct between Schultz and the other girl. This scenario is more akin to *State v. Tschilar*, 200 Ariz. 427, 27 P.3d 331 (App. 2001), than *Alvarez*. *See Alvarez*, 205 Ariz. 110, ¶ 15, 67 P.3d at 711 (finding *Tschilar* distinguishable). In *Tschilar*, this court upheld the trial court's finding the aggravating factor of multiple victims when the defendant had kidnapped and assaulted a group of four teenagers. *Id.* ¶ 34. We reasoned that "by committing the acts against multiple victims simultaneously, [the defendant] altered the character and increased the magnitude of the offenses." *Id.* Similarly, here, Schultz committed multiple acts against B. and R. simultaneously, thereby changing the nature of the offenses and increasing their seriousness.

¶19 Moreover, in *Alvarez*, the defendant's sentence was already enhanced pursuant to A.R.S. § 13-702.02 for multiple offenses not committed on the same occasion but consolidated for trial. 205 Ariz. 110, ¶ 4, 67 P.3d at 708. Therefore, it was improper to aggravate his sentence based on multiple victims when his sentencing range had already been enhanced on that basis. In contrast, Schultz's sentence was not enhanced pursuant to

§ 13-702.02. The trial court did not err when it considered in aggravation on certain offenses the fact that there were multiple victims in a single incident.[3]

¶20 The convictions and the sentences imposed are affirmed.

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PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

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PHILIP G. ESPINOSA, Judge

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GARYE L. VÁSQUEZ, Judge

[3]The state notes Schultz did not object to the trial court considering the aggravating factors found by the jury and, therefore, we should review the issue for fundamental error. We find no error, fundamental or otherwise, on this issue.